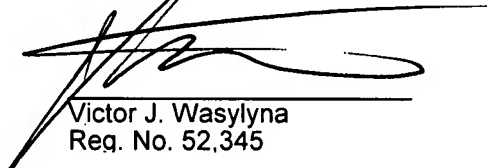




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Victor J. Wasylyna  
Reg. No. 52,345

PATENT

## IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

### Application of:

Applicant : Keeler, Sr.  
Serial No. : 10/691,480  
Filed : October 21, 2003  
Title : METHOD FOR PACKAGING CRABMEAT  
Docket : 424532-00002  
Examiner : Jyoti Chawla  
Art Unit : 1761

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Sir:

### PRE-APPEAL BRIEF REQUEST FOR REVIEW

This request for pre-appeal brief review is filed in response to the final Office action mailed on October 4, 2007 and the advisory action mailed on October 25, 2007 and is accompanied by a Notice of Appeal and the required fee. Claims 3-5, 7, 10, 12, 13, 15 and 18 are currently pending and have been finally rejected. Applicant respectfully submits that the rejections of record are based upon factual and legal errors and, therefore, are clearly improper and without basis.

The claims of the present application are directed to a pasteurized crabmeat product packaged in a flexible pouch, wherein the amount of ambient air within the flexible pouch is controlled to achieve an ambient air to crabmeat ratio of about 13 to 20 percent by volume. The

claimed ambient air to crabmeat ratio of 13 to 20 percent by volume creates an environment within the sealed, pasteurized flexible pouch in which anaerobic bacterial growth is prevented.

It should be noted that foodborne anaerobic bacteria, such a *Clostridium botulinum*, are very difficult to detect by the ordinary consumer and, if ingested, may result in serious illness or death. (Application, p. 3, ¶ 8.) The claimed packaged crabmeat product and associated method overcome this problem by creating an atmosphere that discourages the propagation of anaerobic bacteria. (Application, p. 3, ¶ 9.)

Thus, the claimed packaged crabmeat product and associated method provide a safer and lower cost finished product by using only a flexible pouch and ambient air to package crabmeat in a way that discourages anaerobic bacterial growth.

Claims 3-5, 7, 10, 12, 13, 15 and 18 stand finally rejected under 35 U.S.C. § 103(a) based upon a combination of (1) U.S. Patent No. 5,268,189 to Doerter (the “Doerter reference”), (2) Peterson, M. E., G. A. Pelroy, F. T. Poysky, R. N. Paranjpye, F. M. Dong, G. M. Pigott and M. W. Eklund. “Heat-Pasteurization Process for Inactivation of Nonproteolytic Types of *Clostridium botulinum* in Picked Dungeness Crabmeat.” *Journal of Food Protection* 60(8) (1997): 928-934 (the “Peterson et al. reference”), (3) U.S. Patent No. 2,546,428 to Byrd (the “Byrd reference”), (4) Air Liquide Canada, “Packaging and Preserving Fish and Sea Products” (Abstract Only) (the “Air Liquide reference”) and (5) U.S. Patent No. 4,840,805 to Sugisawa et al. (the “Sugisawa et al. reference”). Each of these cited references is discussed in turn below prior to addressing the factual and legal errors stemming from their combination.

The Doerter reference discloses a process for packing shellfish, such as crab, in a container. In particular, the only process disclosed in the Doerter reference includes the following steps: (1) packing the shellfish in the container, (2) filling the container with a carrageenan/water mixture such that “[t]he mixture fills the container and effectively forces any air from the container, leaving only shellfish and the carrageenan mixture,” col. 3, ll. 8-10, (3) hermetically sealing the container, (4) sterilizing or pasteurizing the container and (5) cooling the container.

Thus, rather than teaching “controlling a volume of ambient air in [a] flexible pouch to obtain an ambient air to crabmeat ratio within [the] flexible pouch of about 13-20% by volume,” as required by the pending claims of the present application, the Doerter reference teaches

removing the air from the container by filling the container with a carrageenan/water mixture that displaces air. Therefore, it is submitted that the Doerter reference teaches away from the claimed packaged crabmeat product and method.

The Peterson et al. reference discloses containing Dungeness crabmeat in oxygen-impermeable flexible pouches that are heat-pasteurized. After pasteurization, the pouch contents were incubated anaerobically and the endpoints at which spores survived were determined by the presence of toxin in the enrichment medium. The authors determined that pasteurization extends the shelf life of such pouches by inactivating spores of *Clostridium botulinum* nonproteolytic types B, E and F, but not proteolytic strains of *C. botulinum*.

Thus, the Peterson et al. reference discloses the advantages of pasteurization. However, the Peterson et al. reference does not disclose or suggest a pasteurized crabmeat product (or associated method) packaged in a flexible pouch, wherein the amount of ambient air within the flexible pouch is controlled to achieve an ambient air to crabmeat ratio of about 13 to 20 percent by volume.

The Byrd reference discloses a method for packaging fresh shellfish in a container. The method includes the following steps: (1) packaging shellfish meat in the container, (2) sealing the container with a minimum amount of air therein, (3) heating the sealed container to 171 °F, (4) cooling the heated container and (5) refrigerating the container until consumed.

Thus, rather than teaching “controlling a volume of ambient air in [a] flexible pouch to obtain an ambient air to crabmeat ratio within [the] flexible pouch of about 13-20% by volume,” as required by the pending claims of the present application, the Byrd reference teaches vacuumizing or tightly packing the container in order to “reduce to the minimum” the air space in the container. Indeed, the Byrd reference teaches creating the anaerobic environment that the claimed ambient air to crabmeat ratio of 13 to 20 percent by volume is intended to avoid. Therefore, it is submitted that the Byrd reference teaches away from the claimed packaged crabmeat product and method.

The Air Liquide reference discloses packaging “non-salted, smoked, filleted, eviscerated whole fish and fresh sea products” in gas-tight plastic wrapping or bulk plastic trays or containers. The packaging is subjected to a vacuum and then a gaseous atmosphere, consisting of 60-80 percent by volume CO<sub>2</sub> and 20-40 percent by volume oxygen, is introduced to the

packaging. The modified atmosphere is such that the development of anaerobic flora, such as *Clostridium botulinum*, is avoided.

Thus, the Air Liquide Canada reference discloses the use of a modified atmosphere of 60-80% CO<sub>2</sub> and 20-40% oxygen to inhibit the growth of anaerobic bacteria. The Air Liquide Canada reference does not teach or suggest “controlling a volume of ambient air in [a] flexible pouch to obtain an ambient air to crabmeat ratio within [the] flexible pouch of about 13-20% by volume,” as required by the pending claims of the present application.

The Sugisawa et al. reference discloses a process for packing fish (not crabmeat) in a pouch. In particular, the Sugisawa et al. reference discloses packing dried, broiled fish in a pouch, vacuum sealing the pouch to achieve an air content in the pouch of 25 percent or less and sterilizing (not pasteurizing) the pouch.

Thus, the Sugisawa et al. reference is directed to an entirely different type of product and method than the product and method disclosed and claimed in the present application. Specifically, the Sugisawa et al. reference is directed to a fish product (not crabmeat) that is vacuum sealed (not controlled “to obtain an ambient air to crabmeat ratio within said flexible pouch of about 13-20% by volume”) and sterilized (not pasteurized).

Accordingly, neither the Doerter reference, the Peterson et al. reference, the Byrd reference, the Air Liquide reference, nor the Sugisawa et al. reference teaches or suggests “controlling a volume of ambient air in [a] flexible pouch to obtain an ambient air to crabmeat ratio within [the] flexible pouch of about 13-20% by volume,” as required by the pending claims of the present application. Any assertion by the Examiner to the contrary is clear factual error.

A basic requirement for establishing a *prima facie* case of obviousness is that “the prior art reference (or references when combined) must teach or suggest all the claim limitations.” (MPEP § 2143.) None of the references in the Examiner’s proposed combination teach or suggest controlling the ambient air to crabmeat ratio within the flexible pouch to about 13 to 20 percent by volume and, therefore, the Examiner’s proposed combination of the Doerter, the Peterson et al., the Byrd, the Air Liquide and the Sugisawa et al. references cannot, as a matter of law, properly establish a *prima facie* case of obviousness. Withdrawal of the rejections of claims 3-5, 7, 10, 12, 13, 15 and 18 under § 103(a) is respectfully requested.

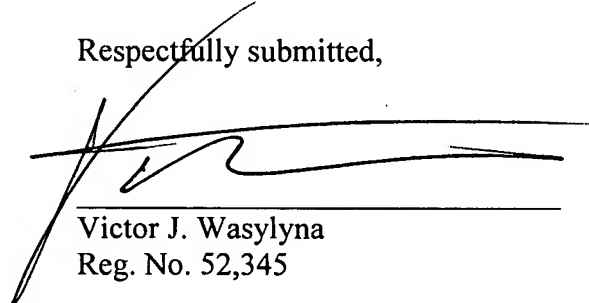
In a first alternative grounds for rejection, claims 3-5, 7, 10, 12, 13, 15 and 18 were

finally rejected under 35 U.S.C. § 103(a) based upon a combination of (1) U.S. Patent Pub. No. 2002/0061412 to Ueyama et al. (the "Ueyama et al. reference"), (2) the Peterson et al. reference, (3) the Air Liquide reference and (4) the Sugisawa et al. reference. However, the Ueyama et al. does not teach or suggest "controlling a volume of ambient air in [a] flexible pouch to obtain an ambient air to crabmeat ratio within [the] flexible pouch of about 13-20% by volume," as required by the pending claims of the present application. Therefore, for the reasons expressed above, the rejections of claims 3-5, 7, 10, 12, 13, 15 and 18 under § 103(a) based upon the combination of the Ueyama et al., the Peterson et al., the Air Liquide and the Sugisawa et al. references is based upon clear factual and legal error and should be withdrawn.

In a second alternative grounds for rejection the Examiner introduces GB 2,343,611 to Lett et al. (the "Lett et al. reference") and in a third alternative grounds for rejection the Examiner introduces U.S. Patent No. 3,852,486 to Walker et al. (the "Walker et al. reference"). However, neither the Lett et al. reference nor the Walker et al. reference teaches or suggests "controlling a volume of ambient air in [a] flexible pouch to obtain an ambient air to crabmeat ratio within [the] flexible pouch of about 13-20% by volume," as required by the pending claims of the present application. Therefore, for the reasons expressed above, the claim rejections citing the Lett et al. and the Walker et al. references are based upon clear factual and legal error and should be withdrawn.

For the foregoing reasons, it is respectfully submitted that the rejections of record are clearly improper and without basis and that the claims currently pending are distinguishable from the cited references and in condition for allowance.

Respectfully submitted,



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